

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of
All Others Similarly Situated,

1:18-cv-01311-PKC-RLM

Plaintiff,

-against-

CREDITGUARD OF AMERICA, INC., FREEDOM DEBT
RELIEF, LLC, FREEDOM FINANCIAL NETWORK, LLC,
and FREEDOM FINANCIAL NETWORK FUNDING, LLC,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the accompanying Declaration of Todd C. Bank, the accompanying Memorandum of Law, and all of the other pleadings and proceedings herein, Plaintiff will move the Court, on a date and at a time to be determined by the Court: (1) pursuant to Rule 11 of the Federal Rules of Civil Procedure, for sanctions against Neil E. Asnen and Klein Moynihan Turco LLP; and (2) for any other additional just and proper relief.

Dated: May 20, 2019

Respectfully submitted,

s/ Todd C. Bank

TODD C. BANK,
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By Todd C. Bank

Counsel to Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Defendants.

DECLARATION OF TODD C. BANK

1. I am the plaintiff in the above-captioned matter.
2. Annexed hereto as Exhibit “A” is a copy of the transcript of the oral argument of December 11, 2018, which I purchased in order to respond to the motion for sanctions by former Defendant, CreditGuard of America, Inc.
3. Annexed hereto as Exhibit “B” is a copy of the invoice for the transcript described in paragraph “2.”

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

s/ *Todd C Bank*
Todd C. Bank
Executed on May 20, 2019

Exhibit “A”

Transcript of Oral Argument

December 11, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

TODD C. BANK,)	Civil Action
)	No. 18-1311 (PKC)
Plaintiff,)	
)	ORAL ARGUMENT
vs.)	
)	Brooklyn, New York
CREDITGUARD OF AMERICA, INC.,)	Date: December 11, 2018
et al,)	Time: 2:00 p.m.
)	
Defendants.)	

TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE
THE HONORABLE JUDGE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Plaintiff: Todd C. Bank, Esq.
119-40 Union Turnpike, Fourth Floor
Kew Gardens, New York
718-520-7125

For the Defendants: Neil Asnen, Esq.
Klein Moynihan Turco LLP
450 Seventh Avenue, 40th Floor
New York, New York 10123
212-246-0900

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

Court Reporter: Annette M. Montalvo, CSR, RDR, CRR
Official Court Reporter
United States Courthouse, Room N375
225 Cadman Plaza East
Brooklyn, New York 11201
718-804-2711

1 (WHEREUPON, commencing at 2:03 p.m., the following
2 proceedings were had in open court, to wit:)

3 THE COURTROOM DEPUTY: Civil cause for oral
4 argument, Docket 18-CR-1311, *Bank v. CreditGuard of America*
5 *Inc. et al.*

6 Will the parties please state their appearances for
7 the record.

8 MR. BANK: Good afternoon, Todd Bank for the
9 plaintiff.

10 THE COURT: Good afternoon.

11 MR. ASNEN: Good afternoon, Your Honor. Neil Asnen
12 for the defendants.

13 THE COURT: Good afternoon to you as well.

14 As the parties know, we are here for oral argument,
15 as requested by defendants on their motion to dismiss and to
16 strike the complaint and portions thereof in this matter. And
17 to, in effect, terminate this action via the dismissal
18 motions.

19 What I am going to do is I am going to let you
20 start, Mr. Asnen, and supplement or reiterate whatever
21 arguments you have made in your written submission, and then
22 I'll let Mr. Bank respond. Just as a warning, I may interrupt
23 you, to the extent that you are making arguments, just to ask
24 you some questions that I may have about points that you are
25 going to make. But I will give you the floor to make whatever

1 arguments you want to at this point, and to let Mr. Bank
2 respond.

3 MR. ASNEN: Sure, and I will welcome any questions
4 that Your Honor has, as much of my argument has already been
5 stated in the papers.

6 THE COURT: Go ahead.

7 MR. ASNEN: Good afternoon, Your Honor.

8 Before the Court today, as you mentioned, is
9 defendants' motion to dismiss and/or strike all or portions of
10 the complaint. As Your Honor knows, the plaintiff brought
11 claims for relief in three different tranches. He asserted a
12 TCPA claim over which the Court has original jurisdiction, he
13 asserted a New York state claim, and he asserted various class
14 claims.

15 The defendants made one motion directed to all three
16 versions of that complaint, but I think it's worth noting at
17 the outset that plaintiff took the opportunity to submit three
18 separate opposition memos, and to the defendants' prejudice,
19 and likely to the Court's prejudice, forced us to expend a lot
20 more time and expense, when all of this could have been
21 briefed, as defendants did, within the confines of Your
22 Honor's individual practices.

23 Nevertheless, I guess I'll start with the federal
24 claims over which the Court has original jurisdiction.

25 The defendants' positions that the TCPA claims are

1 subject to dismissal for two separate and distinct reasons,
2 the first of which is a pleading deficiency, failure to state
3 a claim. The complaint makes clear that none of the
4 defendants initiated the subject call. The letter --

5 THE COURT: Let me stop you on that.

6 I have trouble understanding how you, as a
7 representative of all of the defendants, so that will be CGA
8 and -- we will just call them the Freedom Financial entities.

9 MR. ASNEN: From the Freedom entities.

10 THE COURT: Yes, can say that no one, or none of the
11 defendants made the call. Because the allegations, at least,
12 those are what I have to assume to be true, say that, at a
13 minimum, CGA and/or the Freedom Financial defendants, one of
14 them, made the calls, and then there are detailed allegations
15 within the complaint about conversations that Mr. Bank had,
16 albeit on his own initiation when he called back the various
17 numbers, in which a representative of Freedom Financial and
18 also a representative of CGA said that, "Yes, we are
19 affiliated entities." Freedom Financial even said something
20 to the effect of "We are partners with CGA."

21 Now, they also said things to the effect of, "Yes,
22 you must have gotten a call from," and I think they identified
23 CGA at one point and Freedom Financial at one point.

24 So it is hard for me to understand how you could
25 possibly argue that neither groups of defendants, if you will,

1 just to shorthand it, made that call. Clearly there was a
2 call to be -- that was made, as alleged, and, clearly, it was
3 either CGA or Freedom Financial, or both. But neither of
4 them, doesn't seem to me, to even be possible. Do you see
5 what I am saying?

6 MR. ASNEN: Well, I do understand Your Honor's
7 point, but, respectfully, I would note that if you read some
8 of the detailed allegations of the complaint, it is only
9 through a series of transfers that he ultimately got to speak
10 to the Freedom entity and subsequently the CreditGuard entity.

11 THE COURT: But wait a second. That doesn't seem
12 right. It seems what happens is he got the automated call,
13 and then he pressed "1" before that call finished, and he was
14 transferred to somebody who identified himself as being part
15 of CGA, correct?

16 MR. ASNEN: I think it might be easier to call them
17 CreditGuard.

18 THE COURT: No, I'm going with "CGA."

19 I mean, isn't that correct? The first person,
20 Mr. Wright, says, "Yes, I'm here with CreditGuard of America.

21 MR. ASNEN: Yes, but I think that takes a factual
22 leap to get from the actual placing of the call to now you are
23 talking to Mr. Wright. Because some intervening event,
24 pressing the number in response to being prompted by the
25 original recording, is what facilitated the transfer, and then

1 was, I guess, a manual transfer subsequent to that that got
2 him to CreditGuard.

3 THE COURT: So you don't think it is a reasonable
4 inference that when someone gets an automated call that says,
5 "press 1, if you want to follow up," and when that person does
6 it, that someone answers from CGA, that one could infer that
7 CGA had something to do with the original call being
8 initiated, even if they weren't the caller, they certainly
9 were working with the person, the company making the call?

10 MR. ASNEN: I think now Your Honor is touching upon
11 two separate issues. Sounds like we're turning towards the
12 vicarious liability for the initiation of the call, and my
13 original point was that the complaint doesn't actually allege
14 that the defendants initiated that call. So in order to hold
15 any of these defendants liable for that initiation, there
16 would be a factual basis that needs to be alleged to establish
17 this vicarious liability theory.

18 THE COURT: Okay. Let's -- if I give you that,
19 hasn't Mr. Bank done that? Because he then goes on, much more
20 so than other consumers would do, to make a series of phone
21 calls in which he gets representatives from CGA and Freedom
22 Financial on the phone, either separately or even in a
23 conference call, and what they say to him throughout is, "Oh,
24 yes, Freedom Financial and CGA work together," and that if you
25 said something, or you must have said something to them that

1 made it clear to Freedom Financial that you didn't qualify for
2 their services, so, therefore, they would have referred you to
3 us, you don't think that establishes some kind of agency, some
4 sort of ratification or apparent authority? I mean, I am just
5 stunned, actually, in a way. Because, admittedly, a lot of
6 these cases do involve what you say are bare bones allegations
7 about a relationship between different companies.

8 This does seem to be different. And don't get me
9 wrong, I am not necessarily pleased that this is being brought
10 as a class action lawsuit the way it is, and that Mr. Bank,
11 obviously, is famous for, but it does seem to me in this case
12 he's done his legwork or homework to try to shore up that
13 relationship between the two companies and to have them, in
14 essence, either ratify or indicate to him, and he's the
15 relevant party here, that there is some apparent authority by
16 one company or the other to make the phone call initially, or
17 to make that initial phone call on behalf of the other party,
18 admittedly without necessarily knowing which party made the
19 call, but clearly indicating that one of them did it, and the
20 one that did it did so with either apparent authority or
21 ratification of the other.

22 I mean, how do you escape that when you have this
23 level of detail?

24 MR. ASNEN: Well, again, I would just go back to the
25 fact that there's nothing in this complaint tying the

1 defendants to the entity that initiated the call. So even if
2 you were to assume the truth of the allegations concerning the
3 business relationship between the Freedom entities and
4 CreditGuard, whether or not that rises to an agency principal
5 relationship, I will put that to the side, I think that's
6 separate and apart from the agency relationship that would be
7 necessary between the defendants and the entity that initiated
8 the call, which -- so I -- the way we view this is that there
9 are a few different calls along the way. There's the original
10 call with the message, and then the subsequent transfers to
11 the call.

12 So I think that it is helpful to take that initial
13 call, which is the subject of the lawsuit and say, okay, who
14 initiated it, was there an agency principal relationship
15 between the entity that placed it and the entities along the
16 chain. And to my eyes and our position is that there's
17 nothing in the complaint that sets forth that agency
18 relationship sufficient to attach vicarious liability to any
19 of these entities.

20 THE COURT: So your argument really boils down to
21 that first automated phone call that's made, there's no
22 identification of who made the call, because there's no --
23 although let me -- hold on one second.

24 Is there a caller ID that goes with that first call?
25 There's a number, right, Mr. Bank?

1 MR. BANK: Yes. A spoof number.

2 THE COURT: A spoof number, okay.

3 So based on the caller ID, there's no identification
4 of what party instigated, I will call it, a robo call, right?

5 MR. BANK: Correct. That's right.

6 THE COURT: So, basically, your argument, Mr. Asnen,
7 is that because there's no direct allegation about the
8 identity of the instigator of the automated call, there isn't
9 a reasonable inference based on the subsequent conversations
10 that Mr. Bank had with representatives of CGA and Freedom
11 Financial that would connect them to that initial automated
12 call.

13 MR. ASNEN: Yes.

14 THE COURT: Okay. Let me ask you then, Mr. Bank, it
15 is true that there was an automatic call, and when you pressed
16 "1," you were referred to someone named Ken Wright, a credit
17 advisor with CGA, correct?

18 MR. BANK: Correct.

19 THE COURT: Okay. Then you subsequently called an
20 entirely different number -- or let me go back, actually.
21 Then when you were disconnected with Mr. Wright he called you
22 back from --

23 MR. BANK: He called me back, and even asked me,
24 without my saying a word, other than maybe "hello," he asked
25 me for the alias I had just given when I received the call.

1 He certainly knew who I was in that regard.

2 THE COURT: Right. So there's certainly a
3 connection between Mr. Wright from CGA and the first automated
4 call because he knew the alias you gave of Mr. Larsch,
5 L-a-r-s-c-h --

6 MR. BANK: Something like that.

7 THE COURT: -- in response to the automated call,
8 correct?

9 MR. BANK: Correct.

10 THE COURT: Okay. Doesn't that at least connect the
11 initiating call to CGA?

12 MR. ASNEN: I think it would take an inference
13 that's not spelled out in the complaint.

14 THE COURT: What more should be spelled out? He
15 gives an alias, so, therefore, one could assume that this name
16 of Larsch isn't connected to Mr. Bank's phone number,
17 residential phone number, and somehow miraculously Mr. Wright
18 from CGA just guesses that he goes by the alias of Larsch? I
19 mean, that seems the least probable inference. The much more
20 likely one, and I don't think that many dots have to be
21 connected, is that Mr. Wright, who actually identified himself
22 in the first call, I think, after the line was transferred to
23 him, with the pressing of "1," then calls back and knows
24 exactly who Mr. Bank claimed he was in that automated -- the
25 call that went from the automated call to the transfer call.

1 I mean -- sorry. Let me back up a little bit.

2 MR. ASNEN: Can I jump in for a second?

3 THE COURT: Yes.

4 MR. ASNEN: What I think is confusing, maybe to all
5 of us, is that from the initial allegations, the early
6 allegations in the complaint, Your Honor's come to the
7 conclusion that you press "1" and you get Mr. Wright. But the
8 later allegations suggest strongly that it was Freedom that
9 transferred Mr. Bank to CreditGuard. So there seems to be
10 something lost in translation in the allegations here.

11 THE COURT: Well, wait. The only thing that's
12 missing, and you are right about this, that when Mr. Bank
13 presses "1," we don't -- you are saying you don't know who
14 made that automated call, but somehow when he pressed "1," it
15 goes to Ken Wright of CGA, right?

16 MR. ASNEN: Well, that's not strictly speaking what
17 the complaint says. It says, spoke to a live operator, and
18 then the live operator puts him on hold, and then eventually
19 he gets to Mr. Wright.

20 THE COURT: Okay. But why isn't it fair to assume
21 that the operator then at least is working with Mr. Wright?
22 If not working -- when I ask you --

23 MR. ASNEN: Certainly alleged.

24 THE COURT: Sorry. If not working at CGA with
25 Mr. Wright, working at a company that is working with CGA and

1 Mr. Wright, whether it is Freedom Financial or some other
2 company. It seems to me there's a connection between the
3 automated call, whoever the operator was, and then CGA,
4 because that chain of events is linked by the transfers,
5 right?

6 MR. ASNEN: Correct.

7 THE COURT: Okay. Why isn't that enough at least to
8 establish that CGA is in some way responsible for the call
9 being initiated, either by giving authority to whoever
10 initiated that call, and then to have that operator transfer
11 the call to CGA, or ratifying it by then accepting the call
12 from Mr. Bank, not from him, but with Mr. Bank, and then
13 proceeding in that fashion. Either way, CGA is connected to
14 that original automated call, at least for purposes of a
15 reasonable or plausible inference at that point.

16 I mean, you are really trying to dance on the head
17 of a pin to try to separate them in some way that doesn't make
18 any sense, that some random third party, with whom CGA has no
19 relationship, is making --

20 MR. ASNEN: Well, there's not a principal agency
21 relationship.

22 THE COURT: But is somehow making calls, automated
23 calls to citizens, and then transferring those citizens when
24 they do as instructed by pressing "1," to CGA, and somehow,
25 some random act of, I don't know if it is called kindness or

1 referral or something like that, the more reasonable
2 inference, you would say, is that there's no connection, or
3 that he hasn't alleged enough, at least as to connect CGA to
4 that automated call, that's what you are saying.

5 MR. ASNEN: That's our position, that the complaint
6 hasn't met the minimum pleading standards to allege that kind
7 of a principal agent relationship sufficient to establish this
8 vicarious liability. But I think that at this point, this
9 might be a good segue to talk about that notwithstanding
10 vicarious liability, because it sounds like Your Honor is
11 inclined to say that the complaint meets that threshold.
12 Notwithstanding that, if the conclusion is that this call was
13 placed on behalf of CreditGuard, then the call itself is
14 inoculated from TCPA liability by virtue of the nonprofit
15 exemption.

16 THE COURT: Right. Okay. Then we should talk about
17 the conversations that ensue thereafter in which -- and,
18 again, the standard here is a plausible inference, and in
19 those conversations, representatives of Freedom Financial and
20 CGA both say that they work together, that they -- that CGA is
21 an affiliate and a partner of Freedom Financial, and that when
22 things don't qualify for purposes of Freedom Financial's work
23 or assistance, Freedom Financial refers them to CGA.

24 I think, I mean, under the dual purpose standard, I
25 think they -- CGA, at least at this stage, can't really rest

1 on this immunity under -- or exception under the TCPA. Again,
2 at the pleading stage, there seems to be a very close
3 relationship established in not one, not two, but it seems
4 like three different calls with representatives of both
5 defendants' companies.

6 So, again, I just don't see how you avoid both the
7 agency inference as well as the dual purpose inference, when,
8 in fact, they are both saying, when it doesn't work for
9 Financial Federal (sic.), they send the caller to CGA. At
10 that point, certainly CGA seems to be acknowledging that
11 Federal Financial is making these dual purpose calls on its
12 behalf. Either it is going to be a commercial call that
13 Federal Financial will handle, or it is going to be a referral
14 to CGA, for those who don't qualify.

15 Once they sort of align themselves or link
16 themselves to Federal Financial, I don't think, at this stage
17 at least, they can hide behind this exemption for nonprofits.

18 MR. ASNEN: Well, with respect to -- I think that
19 the FCC has never actually applied this dual purpose standard
20 to the nonprofit exemption. The dual purpose call standards
21 have come when calls are mixed with informational purposes and
22 telemarketing purposes. It's never been extended by the FCC
23 to calls placed by or on behalf of nonprofit exemptions.

24 The language of the exemption itself is pretty
25 unambiguous that calls placed by or on behalf of the

1 nonprofit, taxed as a nonprofit corporation, are exempted from
2 liability. You need to read additional context in order to
3 get outside of that rule. But I don't know if that's
4 necessarily appropriate here, because either the call was
5 placed on behalf of CreditGuard or it wasn't.

6 THE COURT: But here's the thing. I don't think it
7 takes much to read into these set of facts some possible
8 applicability of this exemption. Because here's what we have.
9 We have an automated call that's made by some party, that when
10 "1" is pressed, it goes to an operator, either CGA's or
11 Federal Financial's, or some other parties, but then the call
12 ends up being referred to CGA, right? And so the question is,
13 is that initial call, which says something to the effect of,
14 you know, we can help you with your consumer services, that
15 call is a commercial call by nature. But then the question --
16 or then the decision tree that if he says, as Mr. Bank did, "I
17 only have \$14,000," or "I have \$14,000 in credit card debt,"
18 he's shunted in one direction versus another.

19 Again, if, as I found, or will find, there's at
20 least some agency relationship between CGA and the party
21 making the call, which seems to me based on the other
22 conversations that Mr. Bank has, was probably Freedom
23 Financial, if that initial call had a partially commercial
24 component, which it did, because, again, there was a decision
25 tree, if "X," you go to Federal Financial, if "Y," you go to

1 CGA, then it seems to me CGA shouldn't be able to avail itself
2 of the exemption under the TCPA. Because, in effect, they are
3 hiding behind this Federal Financial company in some way to
4 have them be the stalking horse, if you will, but, clearly,
5 the initial contact, there's no question, was commercial in
6 nature.

7 MR. ASNEN: If I may, Your Honor.

8 THE COURT: Yes.

9 MR. ASNEN: The nonprofit exemption is not limited
10 to noncommercial calls. It is limited to calls placed by or
11 on behalf of tax exempt organizations. They can be
12 commercial. I think that Your Honor might be misinterpreting
13 the rule. I would refer you to the *Henry* case that we cited
14 in our brief, which I think is somewhat on point. Those calls
15 at issue were commercial in nature. The dialer, in fact,
16 was -- they got a direct benefit out of the calls that were
17 being placed. But they were being placed on behalf of a tax
18 exempt organization, and the Court found that the nonprofit
19 exemption applied to exempt the call from liability.

20 THE COURT: So let me make sure I am certain of what
21 you are talking about. The FCC language is essentially dual
22 purpose, means a call that -- with a customer, that is both
23 informational or has an informational component, as well as a
24 marketing component. And the FCC said back in 2003, those are
25 prohibited, right?

1 MR. ASNEN: Correct. Well, they are not -- right.
2 They are not -- they don't get the benefit of the exemption.

3 THE COURT: Okay. And though you're arguing that --

4 MR. ASNEN: Or that whatever applicable exemption
5 wasn't directed towards the nonprofit exemption.

6 THE COURT: Okay. But so isn't it true that if
7 there was a marketing component to this initial call to
8 Mr. Bank, that that would meet the dual purpose definition, at
9 a minimum, assuming that there's then also an informational
10 component?

11 MR. ASNEN: Well, I would respectfully disagree.
12 Counsel cited to the *Aranda v. Caribbean Cruise Line* case in
13 his opposition for the proposition that the nonprofit
14 exemption would not apply here. And you can see, as the court
15 analyzes that issue, it correctly notes that the FCC has
16 determined that calls placed by or on behalf of tax exempt
17 nonprofit organizations are not telephone solicitations for
18 purposes of the TCPA.

19 THE COURT: If there's no marketing component?

20 MR. ASNEN: If they're placed by or on behalf of a
21 nonprofit. Those calls are allowed to market their goods and
22 services of tax exempt organizations. So where there might
23 otherwise be advertisements, solicitations, telemarketing, the
24 FCC said if they are done on behalf of a tax exempt
25 organization, they are not telephone solicitation.

1 THE COURT: So you're saying if all that happens is
2 CGA is marketing its own services as a nonprofit, that
3 wouldn't run afoul of the --

4 MR. ASNEN: I think that's pretty clear.

5 THE COURT: But if they market the services of
6 another organization, such as federal -- sorry, Freedom
7 Financial, that would run afoul of the rule?

8 MR. ASNEN: No, I would take the position that they
9 are placed by a tax exempt organization.

10 THE COURT: So anything a tax exempt organization
11 does is fine?

12 MR. ASNEN: By the letter of the regulation, yes.
13 Within the context of the TCPA, of course.

14 THE COURT: Mr. Bank, do you want to respond to
15 that?

16 MR. BANK: Sure. First, in *Aranda*, which is
17 discussed on page 22 of the brief that deals with the TCPA
18 claims, the court dealt with both for profit entities and tax
19 exempt nonprofits, and it declined to dismiss the claims
20 against all of them. The dual purpose rule, the concept is
21 that if a call is partly legal, slash, exempt, and partly
22 illegal, slash, nonexempt, the call is not exempt. So Your
23 Honor's stated that -- or indicated that CGA is sort of hiding
24 behind Freedom Financial. That's exactly what it's trying to
25 do here.

1 THE COURT: But, again, what we're quibbling about,
2 though, is what does it mean to be exempt. According to
3 Mr. Asnen, the case law, despite what it says in the 2003 FCC
4 report, it is fine for CGA to advertise or market its own
5 services, and, also, it seems to market the services of
6 Freedom Financial.

7 MR. BANK: Well, the former --

8 THE COURT: That's what I'm saying.

9 MR. BANK: -- I think might be true. Let's say CGA
10 is a non -- a tax exempt organization, and it wants to raise
11 money for the organization. They sell magazines. Okay. That
12 would seem to me to be exempt. So you get a robo call, "Press
13 '1' if you'd like to get US News and World Report for 20
14 dollars a year."

15 But in this case, they have gone beyond that. In
16 this case they are acting in part or jointly with Freedom
17 Financial. So let's say, again, for --

18 THE COURT: To do what? To market Freedom
19 Financial's commercial services?

20 MR. BANK: Correct.

21 THE COURT: Okay. And that you would say, contrary
22 to what opposing counsel is saying, would violate the FCC
23 rule?

24 MR. BANK: Correct. When the FCC uses the term
25 "buyer on behalf of a nonprofit," it means that the nonprofit,

1 as I understand it, is the, and only "the," ultimate potential
2 or hoped for beneficiary. If an ordinary company, if IBM
3 wants to sell computers, for lack of a more modern example, I
4 guess, and they hire the Red Cross to make telemarketing
5 calls, the Red Cross being, I assume, a nonprofit, that's not
6 the kind of exemption being spoken of. In fact, if it were
7 the opposite, if the Red Cross hired IBM to make calls for the
8 Red Cross, that would be exempt, it would seem to be exempt,
9 as against all those -- both of those entities, both IBM and
10 Red Cross. But, here, and like in my other hypothetical, we
11 are dealing with the opposite situation in which a nonprofit
12 makes calls for the ultimate beneficiary, a for profit.
13 That's not the kind of thing the FCC was speaking of at all.

14 THE COURT: Here's a question, though. What in your
15 complaint, though, gives rise to that inference? In other
16 words, right now what you have is an anonymous automated call.
17 When you pressed "1," you were sent to an operator, again,
18 without any indication of who that operator worked for. Then
19 you eventually were transferred to CGA, and that person you
20 spoke to briefly, you were disconnected, the CGA person called
21 you back, and assume for the moment they tried to market their
22 own services, we can help you or something like that.

23 None of that on its face would be contrary to its
24 tax exempt status or its -- sorry, non -- sorry, nonprofit
25 status, correct?

1 MR. BANK: I think so far, so good, yes.

2 THE COURT: But you're making the further allegation
3 that they are really a stalking horse in some way for the
4 federal -- Freedom Financial group, and that they are
5 really -- they made the call for Freedom Financial. Where
6 does that come from, with respect to your call? Because even
7 assuming, as I must, that there are all these conversations
8 where everyone acknowledged that they had this agency
9 relationship, or I will call it that for shorthand, or a close
10 working relationship, where's the evidence, though, that in
11 this instance, as to you, the call was made by CGA on behalf
12 of Freedom Financial?

13 MR. BANK: Well, I don't allege -- I don't know who
14 made the call, and we talk about -- I talk about, I should
15 say, not "we," I talk about in the brief, and this also goes
16 with the -- I have the case here. It is in point 2, I think
17 it is in point 2 of the brief dealing with the TCPA claims,
18 which is that -- and the FCC talked about it as well, a
19 consumer or recipient of one of these robo calls is not
20 ordinarily expected to be able to identify the party that made
21 the call, and in this case, how could I? The caller ID was
22 spoofed, which I allege was deliberately done so that I
23 wouldn't be able to know who's calling. And they are all
24 spoofed these days. Most of the calls I get, if it has my
25 area code and prefix and I don't recognize it, it's a robo

1 call. Nine out of ten, at least.

2 So to go back to the question, as the complaint
3 describes, CGA's position is this. If you qualify, based on
4 the amount of debt you have, or something like that, for our
5 services, we will try to market our services to you. If you
6 do not qualify, meaning that your debt is either above or
7 below whatever the cutoff was, we will then refer you to or
8 back to Freedom Financial. So to that extent -- and, again,
9 and vice versa, if you talk with Freedom Financial, and you
10 say, "I have 'X' amount in debt, in credit card debt," and it
11 doesn't meet or exceed their threshold, Freedom Financial will
12 then shuttle you over to CGA. Again, vice versa.

13 THE COURT: But the problem you have is that your
14 allegations don't actually show that that goes two ways. In
15 other words, what you really have is, you have what reasonably
16 or best can be inferred to be a call from CGA, or even Freedom
17 Financial, but then they sent you to CGA, but you don't have
18 any allegations that show that CGA was, as you just said,
19 referring or marketing the services of Freedom Financial,
20 because even your statements with these various people who
21 work for both groups simply say, when Freedom Financial
22 determines that they cannot help you, they'll refer the
23 consumer to CGA. But it doesn't say the opposite. It doesn't
24 say CGA operates as a marketer in some way, or a referrer for
25 Freedom Financial. And isn't that important in terms of the

1 exemption for CGA? I mean, people can refer, commercial
2 entities --

3 MR. BANK: Of course.

4 THE COURT: -- can refer them all day, and even
5 market for them, and send them calls. That's fine, right?
6 That doesn't violate --

7 MR. BANK: Yes, I think so.

8 THE COURT: Right. But CGA cannot, you would argue,
9 without violating this dual purpose ruling.

10 MR. BANK: Correct. Correct.

11 THE COURT: But what evidence do you have that CGA
12 was doing that?

13 MR. BANK: I think -- well, I think there's an
14 inference, which certainly should be allowed to be pursued in
15 discovery, which is if I -- if Freedom Financial says -- I
16 think the cutoff is, I think, \$15,000, and then there was a
17 little wrinkle because I met -- I forget, you know, exactly
18 all the differences, but I actually met the criteria, again, I
19 made it all up, just like the alias, to be sure, just took a
20 stab in the dark at the 14,000, and I think 15,000, or maybe
21 7,500, whatever it was, there was some cutoff. So I got --
22 they say, "We'll refer you then to this one." If I had been
23 talking --

24 THE COURT: The "they" being who?

25 MR. BANK: Freedom Financial to CGA. Now, if I said

1 to CGA, "Oh, I made a mistake, I didn't know -- my debt is not
2 14,000, it is only 7,000," for example, I think an inference
3 can be drawn that they would say, "Well, then you need to deal
4 with -- then we will refer you or you need to deal with
5 Freedom Financial. But, again --

6 THE COURT: But you're just guessing. That didn't
7 happen here.

8 MR. BANK: Well, I think it is a reasonable
9 inference that that's how it would work. Because they do say
10 they work together, they operate jointly.

11 THE COURT: No, but what they keep saying to you is
12 when Freedom Financial finds people who don't meet their
13 criteria, and that's said consistently, they refer, meaning
14 Freedom Financial, refers the customer to CGA. But there's
15 nothing in your allegation that suggests that CGA does the
16 reverse, which is critical for them losing their exempt
17 status.

18 MR. BANK: Well, I guess my response would be, in
19 addition to what I said a moment ago, that I think it is still
20 a reasonable inference, but, if not, it is certainly
21 something -- obviously, it is something, as a practical
22 matter, let's say, let's say I had only been suing Freedom
23 Financial and not CGA, and I inquired -- I would still inquire
24 about that, and then I would just add CGA, if, in fact, I am
25 told that CGA, in the event that it turned out that I only

1 qualified for Freedom Financial, that CGA would then refer me
2 back in some way to Freedom Financial.

3 THE COURT: Well, that may turn out to be true, but
4 right now you have no basis for alleging that.

5 MR. BANK: Well, again, I think it is a fair
6 inference when two companies both say during the conference
7 call no less, that we work together, and that if we can't
8 service you based on the amount of debt that you say you have,
9 A, we'll refer you to B, A being Freedom Financial, B, CGA,
10 that there's no reason for them to tell me that, but if it
11 turned out because they assumed that if I said \$14,000 was my
12 debt, that that would be it.

13 But if it turned out, "Oh, I made a mistake, I just
14 paid half that debt last week, my wife paid it, whatever, my
15 debt is now 6,500," I think it is a reasonable inference that
16 they wouldn't just hang the phone up on me, and say, "I'm
17 sorry, there's nothing we can do, have a nice day," but who
18 knows. Anything is possible.

19 THE COURT: This is sort of like your other
20 allegation where you say, "Had I not pressed '1,' I assume
21 that the following would have happened."

22 That's not how you begin a lawsuit, with assumptions
23 about what would happen. Truthfully, if you wanted to create
24 that situation, perhaps you should have changed your number
25 somewhere in the conversation and said, "Hey, in fact, my debt

1 is more than that."

2 And if that had happened, fine, I would be willing
3 to say that's certainly a substantiated inference to be made.
4 But right now you are just guessing. The truth is, it is also
5 a plausible inference that CGA, mindful of its status as a
6 nonprofit, doesn't do what you're saying, because they don't
7 want to run afoul of the dual purpose rule that exists.

8 So I can't just take a guess that that would happen.
9 You have no basis for assuming that CGA would have referred
10 you back to Freedom Financial. What you do clearly have is
11 that Freedom Financial does refer people to CGA, but there's
12 nothing wrong with that.

13 And, in fact, if Freedom Financial, let's assume,
14 made the initial robo call, and when you pressed "1" and gave
15 the answers that you did, and they referred you to CGA,
16 there's nothing wrong with that either, right?

17 MR. BANK: That's fair. I think that's right.

18 THE COURT: So, I mean, I think you have a problem,
19 and I'm not saying that what you suspect might be happening
20 wouldn't be bad, or isn't actually happening, but you don't
21 have enough factual allegations, I don't believe, right now,
22 to pierce CGA's nonprofit status and accuse it even of a dual
23 purpose -- or of dual purpose activity on behalf of Freedom
24 Financial. That's where I think you are stuck at the moment.

25 MR. BANK: Well, that goes back to a separate issue.

1 Let's say for the sake of discussion that CGA does not refer
2 people to Freedom Financial. But, again, we still have a dual
3 purpose scenario because we have a call that in one respect is
4 legal, to the extent that it is intended to or possibly
5 intended to make CGA the ultimate beneficiary of the call, we
6 have one aspect that's not legal, which is with Freedom
7 Financial.

8 So I don't know why -- I don't see any indication or
9 understand why would the FCC -- and this is what *Aranda* dealt
10 with, when *Aranda* declined to dismiss the nonprofits.

11 THE COURT: Here's what I hear you saying. Hang on
12 one second. It seems to me, and you were maybe too quick to
13 agree with me, is if what happened here and what can
14 reasonably infer happened here, is that if Freedom Financial
15 is the one that initiated the automated call, and then
16 referred you to CGA once you gave your response -- although
17 let me ask you a question. Did you say you had \$14,000 worth
18 of debt to the operator?

19 MR. BANK: Yes. The first live person asked you the
20 typical series of questions, and that's why I first mentioned
21 that figure.

22 THE COURT: And that's when you get sent to CGA?

23 MR. BANK: Correct.

24 THE COURT: So, if anything, there may be a
25 reasonable inference that Freedom Financial was the first --

1 initiated the robo call, because of the subsequent
2 conversations that you had, which said, "We work with them,
3 and when they get someone like you who has only \$14,000 in
4 debt, they refer you to us." That would reinforce some
5 inference that it was Freedom Financial that made the first
6 robo call, and then it was their operator who referred you to
7 Ken Wright of CGA. That's ultimately what your claim could
8 be --

9 MR. BANK: Right.

10 THE COURT: -- it seems to me. But that would take
11 CGA out of the case, in a sense, unless -- well, no, there's
12 no "unless," actually. Because CGA could have Freedom
13 Financial do this on their behalf. There would be nothing
14 wrong with it since they are tax exempt, right?

15 MR. BANK: Well, here's the problem. It wasn't --

16 THE COURT: Not tax exempt, I'm sorry. Nonprofit.

17 MR. BANK: Right. I understand.

18 But here again it goes back to what is a dual
19 purpose call. The initial call -- they make initial calls.
20 They don't know what my debt is, what I am going to claim, as
21 it were, my debt is. So when the initial call is made, they
22 are saying, well, let's see how it goes, we might send this
23 person to Freedom Financial, or we might send the person to
24 CGA.

25 So insofar as the call might -- is intended, 50/50,

1 let's call it, okay, to benefit Freedom Financial, that's
2 unlawful. I don't think that's in dispute, Freedom
3 Financial's a for profit entity.

4 And so the dual purpose, all the dual -- yes, they
5 don't -- the FCC's examples, they were just hypotheticals,
6 don't deal with nonprofit and a for profit, but they deal with
7 a call -- each of the examples deals with different types of
8 calls that were partly lawful, that standing alone this would
9 be a lawful or exempt call, and partly, not fully, but partly
10 unlawful or nonexempt, and the FCC said in each of those
11 cases, the call -- I'm sorry, in each of those cases, the call
12 itself, a hundred percent, not 50/50, the bad 50, I will call
13 it, the bad 50 percent negates the entire call, makes the
14 entire call unlawful.

15 THE COURT: I understand what your argument is. In
16 other words, you actually have to have -- there was some
17 argument about apparent authority to let Freedom Financial
18 make a dual purpose call on their behalf or ratification of
19 that dual purpose call after the fact.

20 MR. BANK: Right. Which certainly happened here.
21 They were both trying to get my business at various points.

22 THE COURT: I suspect the problem, though, is when
23 Freedom Financial makes the call, though, there's nothing dual
24 purpose about it that's illegal as to them.

25 MR. BANK: As to who's "them"?

1 THE COURT: Sorry. Well, no, no, I take that back,
2 actually. I guess -- that's right. I guess the automated
3 call of itself, you would say, is illegal as to Freedom
4 Financial, because they shouldn't be making automated calls.

5 MR. BANK: Correct. I should say automated calls
6 shouldn't be made by whomever it is, with Freedom Financial
7 being one of, let's say in this case, two potential ultimate
8 beneficiaries.

9 THE COURT: Right. That's right. And I guess CGA
10 should not be making those calls as well, but only if it
11 doesn't have the ability to claim this nonprofit exemption.
12 And the reason they can't is because they're either giving
13 authority to Freedom Financial to do it for them, to make
14 these dual purpose calls, or ratifying these dual purpose
15 calls.

16 MR. BANK: I think that makes sense to me.

17 THE COURT: Yeah.

18 MR. ASNEN: I think it is important to note that the
19 dual purpose doctrine has never been applied by the FCC to the
20 nonprofit exemption. And while *Aranda* did pay lip service to
21 this, in doing so, they're the only court that did it. I
22 think it's important that no court has followed suit, and I
23 think the Court should show some restraint in not following
24 suit. Because it is our position that *Aranda* got it wrong.
25 The nonprofit exemption language is clear. Calls placed by or

1 on behalf of tax exempt nonprofits are exempt from TCPA
2 liability, and the FCC has never issued any guidance otherwise
3 with respect to this exemption.

4 This particular regulation has never been challenged
5 under the Hobbs Act, the language is unambiguous, and I think
6 that it should be enforced as such.

7 THE COURT: But what you are arguing for is a matter
8 of policy, really, seems wrong, which is that so long as a
9 company sets itself up as a nonprofit, they can do whatever
10 they want. They could solicit business for -- or they can
11 violate the automated call rule, that's what you would say,
12 right?

13 MR. ASNEN: Well, I think along the lines of showing
14 restraint, it is not totally necessary to play hypotheticals
15 when we have an actual call that happened here, that I think
16 that the nonprofit exemption applies to.

17 THE COURT: Well, right. But, I mean, I guess let's
18 take this situation. If the allegations are accepted as true,
19 they suggest that -- or they reasonably suggest that CGA is
20 basically working with Freedom Financial to make these calls
21 to market services of either Freedom Financial or CGA,
22 whatever the circumstances are, and that they are then
23 skirting, because they have this exempt status, the regulation
24 that would prevent them from making automated calls, and they
25 shouldn't be held liable, but Freedom Financial should be, is

1 essentially what you are arguing.

2 MR. ASNEN: It is our position that the exemption
3 applies to the call, not to the party, specifically.

4 THE COURT: But for the moment, assume that I think
5 there's some showing of agency here. And if that's true,
6 you're still, as your fallback, I think, arguing that no
7 matter what, CGA, as a nonprofit, should not be held
8 responsible for potential violations of the TCPA. Because it
9 is their status.

10 MR. ASNEN: Well, I mean, I would, I guess, take
11 issue with the way that was phrased, but the point is fair, I
12 think that the exemption takes this call outside the scope of
13 a violation. It is, per se, not -- it is placed by or on
14 behalf of the tax exempt organization. It wouldn't be a
15 violation.

16 THE COURT: Okay. But I guess the problem I am
17 having is, A, the FCC did say that there was this doctrine of
18 dual purpose. The fact that it hasn't been applied in any
19 case, I don't know how compelling that is. Obviously, all the
20 cases are very fact specific. But if I find that there's a
21 reasonable inference that CGA either gave authority to or
22 ratified the actions of Freedom Financial to make this
23 marketing call on its behalf, as well as on behalf of Freedom
24 Financial, so, therefore, a dual purpose call, that CGA should
25 still not be -- should still be exempted from the TCPA because

1 of its status. That's what you're arguing, or that's
2 certainly the logical --

3 MR. ASNEN: Alternative argument, sure. At the very
4 least, CGA should get the benefit of this exemption, if not
5 for the call, at large.

6 THE COURT: But even if they are in some way
7 skirting the -- well, even if they are using their status to
8 benefit a commercial entity that would be barred from doing
9 the conduct that they're accused of, they should still -- CGA
10 should still get the benefit of the exemption.

11 MR. ASNEN: Yes. And I -- to that point, I refer to
12 the *Wengle* case that we cited in our initial brief, where I
13 think it is somewhat analogous to what happened here, where a
14 for profit entity was placing the calls on behalf of a
15 nonprofit, it was soliciting purchases of magazine
16 subscriptions, and ultimately took the vast majority of that
17 revenue from the purchase, but the nonprofit was also getting
18 the benefit of direct donations that were placed on that phone
19 call.

20 So notwithstanding that there was a benefit to the
21 for profit dialer that was attendant to the phone call placed
22 on behalf of the tax exempt organization, the court found the
23 nonprofit exemption applied, and that that call was not
24 subject to TCPA liability.

25 THE COURT: Okay. All right. Let's turn now to the

1 business law violation.

2 Let me turn to you, Mr. Bank, because I think you
3 are going to have a difficult time establishing standing for
4 this one. The question for you is, what injury, if any, can
5 you point to, because I certainly don't include all the time
6 you spent trying to figure out who was calling you to count,
7 given that the purpose of the statute is to prevent people's
8 phones from literally being taking captive by robo calling,
9 whereas here, to the extent that your phone was in use by
10 virtue of the robo call, that was brief, and the other 20
11 minutes or so was your actual efforts to go figure out who was
12 calling you so you could file a lawsuit. That really isn't
13 what the statute was meant to protect.

14 So how is it that you have -- what's your injury
15 here? And go ahead.

16 MR. BANK: Certainly.

17 As far as the idea about not tying up people's phone
18 lines, that deals with the five second rule, which is that
19 when an automated call is made, it must be disconnected within
20 five seconds. That's not my claim.

21 THE COURT: Right.

22 MR. BANK: My claim is that the disclosure
23 requirements, which were obviously intended, and the
24 legislative history, which I don't think should matter, but it
25 does mention it, for what it's worth, was intended to -- it

1 was intended to enable someone to know who's calling so they
2 can communicate -- obviously, it's meant to communicate with
3 the caller. Obviously, when the statute says, you must
4 provide a name, the nature of the call, an address and a phone
5 number, that has nothing to do with tying up a phone line.

6 THE COURT: But here you pressed the button, so you
7 can't say that at the conclusion of the call, you wouldn't
8 have gotten the rest of the information. Because you did get
9 a name, right, to start?

10 MR. BANK: Some of the information has to be
11 provided at the beginning of the call, and some at the end. I
12 got a first name, with no fake -- what I think is a fake
13 generic first name of Jennifer, with no last name, combine
14 that with a fake caller ID, and the message itself did not, at
15 the beginning, like it is supposed to, have -- I forget which
16 is supposed to be the beginning and at the end, but the
17 address and/or phone numbers at the beginning, something else
18 at the end. The point is, though, I allege, and these are the
19 factual allegations, that the message, A, never provided any
20 of the required contact information, the address, the phone
21 number, an actual real name --

22 THE COURT: But that you can't say, because you
23 never listened to the whole call.

24 MR. BANK: Well, there's two things. One, as I
25 state in our brief -- I keep saying "our," but there's only

1 one person here. What I keep stating in my -- which I did
2 state, rather, in my brief, which is that I was able to find a
3 transcript of that exact same message, online, number one.

4 Number two, to the extent that any entities have any
5 bearing here, I think it would be, really, absurd, that the
6 defendant says, if you want to speak to someone, in my case,
7 yes, I wanted to know who I might sue. I want to know who's
8 making these illegal calls, press "1" on the phone. I'm sort
9 of like, if I may, pardon my French, damned if I do, damned if
10 I don't. Because if I don't press "1," I never get to speak
11 to someone, and all I have is a generic recording, named
12 Jennifer, which is not that helpful. I can't really call the
13 operator and say, "Please connect me with Jennifer." I have a
14 fake caller ID number. And so now that I did press "1," now I
15 am being told, "Well, you shouldn't have done that, because
16 now you didn't listen to the rest of the message." Well, if I
17 didn't press "1," I might have heard the rest of the message,
18 but then I wouldn't have known who called or had anything to
19 do with it.

20 THE COURT: Whoa.

21 MR. BANK: Going too fast.

22 THE COURT: Way too fast.

23 MR. BANK: Way too fast. I agree.

24 But that's the gist of it. But, again, the
25 allegation, it is entirely plausible, like I said in my brief,

1 that at some other time, I did access the entire message,
2 which I actually did. In fact, you can probably Google it
3 yourself and it would come up as well. And, again, consist --
4 I didn't allege this, nor did I have to. I might have gotten
5 the same call ten minutes later and listened to the whole
6 message without pressing a key on my phone. That didn't
7 happen, as I recall. But I am just making the point that
8 there's nothing necessarily inconsistent, and that's what
9 we're talking about here. Nothing necessarily inconsistent
10 with my having pressed "1" and, therefore, missed the last oh
11 so many seconds of the message, and my saying that that
12 message, had it been played in full, because I have other
13 evidence, would not or did not, either way, contain the
14 required disclosures.

15 Obviously, anything is possible, but it is -- no
16 inconsistency. The fact that I could turn out to be wrong
17 doesn't mean that the complaint says that I am going to turn
18 out to be wrong, and I am sure that it wouldn't. As a
19 practical matter, I've actually gotten hundreds of messages
20 exactly like this one for the lowering your credit card rates.
21 Maybe the actual verbiage is a little bit different in each
22 message. I've never gotten, never, in hundreds of calls,
23 never gotten any of the type of information that was again not
24 disclosed in this message. But the point is, there's no
25 inconsistency between what I allege and the complaint.

1 THE COURT: That's actually not the point. The
2 question is, can you rely on -- A, you can't rely on your own
3 personal experience with hundreds of calls and make an
4 assumption, for purposes of this case, that the call didn't
5 contain all the necessary information. The question, though,
6 is whether or not, based on what you say you found online of
7 the same exact call, from the same exact company, I assume you
8 are saying?

9 MR. BANK: I don't know -- I don't know. I don't
10 know who made this call, so I don't know who made the call,
11 but I know that the text of the two calls, the one I received
12 and the one I read online were 100 percent identical, even
13 down to the name Jennifer. Again, common name, to be sure.

14 THE COURT: And that call, it didn't contain the
15 required information under the statute.

16 MR. BANK: Correct. And I think another way to look
17 at this is that given -- I was told that I had to press "1" to
18 speak to anybody, and that I followed the directions, I think
19 it would be fair to say, given that I didn't press "1"
20 prematurely, I did it upon being told to do so, that that's
21 when the message ended. The fact that the message would
22 have -- might have, I don't even know if it would have, it
23 might have disconnected the call at that point. I have no
24 idea.

25 But I followed the instructions, essentially, by

1 saying, press "1" to speak to someone, it is like saying press
2 "1" to end this message.

3 MR. ASNEN: That's not what they say.

4 THE COURT: Hold on.

5 MR. BANK: When I pressed "1," the defendant -- the
6 caller, I should say, the caller could have, certainly could
7 have played through the rest of the message. They could have
8 continued it, and then transferred me, but they cut the
9 message off. So they said, to speak to someone, or if you
10 want to look at it a different way, to stop this message,
11 press "1," and I did. I didn't force the defendant to stop
12 playing the rest of the message.

13 THE COURT: But let's go back for a minute to the
14 question, though, about injury, though. So what injury did
15 you suffer? You still need some basic injury.

16 MR. BANK: Absolutely. Yes. But just by the very
17 nature of the violations, obviously, the purpose is to enable
18 someone either, A, to contact the caller or the party on whose
19 behalf the call is made, or, to make it easier to do so than
20 it otherwise would be. It is the risk --

21 THE COURT: But you did that. You pressed "1," and
22 then you spoke to somebody.

23 MR. BANK: That's correct. But I didn't have -- I
24 was still having limited information. I don't know -- I still
25 don't -- maybe some other party made the call. I shouldn't

1 have had to press "1" and wait --

2 THE COURT: Then how were you injured?

3 MR. BANK: Because the message itself, I should have
4 been able to hang up the phone at the end of the message or
5 when I pressed "1," and I understand what you are saying, I
6 think. And I should have been able to get -- I should have
7 had more information. I never got an address. I might have
8 had -- I was supposed to get an address. I might have written
9 a letter. I'm not saying I would have. But it's the risk,
10 and this is what we talk about in *Spokeo* in the brief, or in
11 the one brief, it is the risk of harm. And that's why in the
12 two disclosure cases, the *Adkins* case and *Public Citizen*, if I
13 remember correctly, it wasn't --

14 THE COURT: About voting issues.

15 MR. BANK: Yes. And the court never said, "Well, we
16 have to know what, if anything, the would be recipient of the
17 information would have done with it." They said, the mere
18 fact of the nondisclosure is enough. Look at the *Havens*
19 *Realty*, when it was -- dealt with racial discrimination. They
20 said that a person who was falsely told that because of his
21 skin color or his race that there were no houses available,
22 that person didn't even have to want to buy a house. So there
23 was no injury, he wasn't going to buy a house at all. They
24 even said, on top of it, that even if he expected them to lie
25 to him about a lack of housing, he still would have standing.

1 So here's a person that says, "I went to a real
2 estate office, I -- to ask them what houses are in the area.
3 I had no interest in even obtaining a house. I also had every
4 expectation that they would lie to me." And that person had
5 standing.

6 So, here -- again, the risk of harm. The fact that
7 I ended up speaking to someone, that that's fine, as far as it
8 goes, but in playing the message to me, and in not making the
9 required disclosures, did the defendant create a risk, not
10 actual harm, a risk of actual harm, though. The answer is
11 clearly yes.

12 THE COURT: A risk of harm of what, though?

13 MR. BANK: The risk was that I would be unable to --
14 if I hadn't pressed "1" -- they don't know if I am going to
15 press "1." In not making the disclosures, the defendant is
16 taking the risk that a person who doesn't press "1," they
17 didn't know what I would do ahead of time, I didn't know what
18 I would do ahead of time, would not be able to contact them,
19 would not do so very easily.

20 THE COURT: And so?

21 MR. BANK: That's all I need for standing. The
22 risk.

23 THE COURT: No. That really isn't. I mean, the
24 cases that you cite stand for a fairly narrow position, that
25 there has been determined to be a generalized public good

1 achieved by informing voters of certain issues. This is not
2 that. This is a credit card management company reaches out to
3 you, and, in theory, maybe offers to help you with your credit
4 card debt. That you can't call them back because maybe they
5 didn't give you all the requisite information, or when you
6 pressed "1," somehow you thought that was deficient, even
7 though you spoke to a person, isn't really in the same
8 category, such that it should confer on you standing without
9 some greater showing of injury.

10 I don't think that those two risks of injury, if you
11 want to call it, or actual injury, are really comparable.

12 MR. BANK: I understand. If I may say this. The
13 statute, the GBL statute, has nothing to do with the specific
14 type of call. It doesn't care whether it is a credit card
15 call or selling aluminum siding or anything else. The
16 question is -- but I think we would -- I hope we would agree,
17 that the statute is clearly intended to enable a recipient of
18 a call to contact, after the call, to contact either the
19 caller or the entity who's behind the call.

20 THE COURT: Well, this is, though, I think where we
21 get back to what was the purpose of the statute. And it seems
22 to be, based on the legislative history, that the primary
23 purpose was to prevent people's phones from being tied up from
24 these solicitations where there wasn't an automatic hang up.

25 That seemed to be the primary focus. So I don't

1 actually think, if you are going to argue what the statute was
2 concerned with, it actually isn't so much about being able to
3 contact that solicitor, that you didn't want calling you in
4 the first place and tying up your phone.

5 So, I mean, I think you're barking up the wrong tree
6 in that regard. I do think you are going to have a problem
7 with standing, because you really are alleging a bare
8 violation of the statutory language.

9 MR. BANK: Well, if I may address it. Like I said,
10 I don't think the legislative history, which is now in New
11 York legislative history, but neither here nor there, I don't
12 think -- I'll put it this way. If the legislative -- first of
13 all, the provision that I am suing under has nothing to do
14 with the availability of your telephone line. The rationale
15 for the provisions that I am suing under, I don't think they
16 can be any more clear. You must give telephone number and
17 address of the caller, and so on, so I can know who is calling
18 or call them back. I think that's clear.

19 THE COURT: No question there might be a violation.
20 But the question is, what injury --

21 MR. BANK: Right. The injury is that in making the
22 call, when the defendant made the call -- not the defendant,
23 whoever made the call. In making the call, the defendant was
24 taking -- was causing, I should say, the caller, was causing
25 there to be a reasonable risk that a recipient would not be

1 able to contact the caller or entity who made the call. The
2 fact that they don't know that I'm going to press it, maybe I
3 get this phone, and I am sick of it, and maybe -- there's
4 usually, I think there was in this case, if you don't want
5 more calls, press "3," but that still wouldn't help me contact
6 anybody. It is the risk of harm. There's no question they
7 posed -- it didn't turn out that way, I know that. I did call
8 them. I did press "1." I did speak to them. Of course, I
9 know that.

10 But the question is, was there the risk of harm?
11 Well, there was a very reasonable risk, from the caller's
12 perspective, that I wasn't going to press "1," okay, meaning
13 that I just would have pressed nothing, or I would have
14 pressed another key to, theoretically, try to stop more of
15 these annoying phone calls. So they -- by not engaging these
16 disclosures -- I think it's just common sense what their
17 purpose is, they necessarily posed that risk of harm.

18 THE COURT: Okay. All right. I understand your
19 argument. But as you can probably tell, I am not particularly
20 convinced on that claim, which will obviously affect your
21 class action based on the state law claim.

22 But if you want to be heard on this, Mr. Asnen, you
23 can be, but I'd prefer to turn to the class allegations as
24 they relate to the TCPA claim.

25 MR. ASNEN: Okay. I think Your Honor did a good job

1 following the GBL claim.

2 THE COURT: Okay. So the question I have, although
3 I think I'm not inclined to dismiss the class claims
4 themselves, putting aside for the moment the prior discussion
5 about the TCPA violation itself, and the identity of the
6 parties, the concern, obviously, is that as defendant has
7 argued, Mr. Bank only received a call on his residential
8 telephone, and yet he seeks to certify a class of both -- or
9 makes allegations about a putative class of both cell phone
10 users and residential phone users, which are two separate
11 parts of the TCPA.

12 Now, I think you had argued, I believe, and correct
13 me, Mr. Asnen, that the TCPA doesn't cover -- or only covers
14 residential phone users. That's plainly incorrect.

15 MR. ASNEN: My argument was that the nonprofit
16 exemption only covers calls to the residential line. They
17 don't apply to calls to cell phones.

18 THE COURT: Okay.

19 MR. ASNEN: So just as one example for how this
20 would not involve common issues of fact and law, and how no
21 amount of the discovery will change that, we have a nonprofit
22 exemption defense to calls, such as plaintiffs and calls that
23 he claims are similar to his, but to the extent he wants to
24 represent calls of people -- calls placed to cell phones, of
25 which he did not receive, we would not have such a defense.

1 THE COURT: Okay. Understood.

2 So, I mean, I think the only question then is -- so
3 you're saying you're not making an argument about the class,
4 including cell phone users, with respect to any claims against
5 Freedom Financial, correct?

6 MR. ASNEN: I am not sure I understood.

7 THE COURT: So you're saying that it's CGA, as a
8 nonprofit, can't be held responsible for anything other than
9 automated calls, or calls made to residential phones? That's
10 what you're saying?

11 MR. ASNEN: Well, I think our point is that the
12 existence of this exemption defense is emblematic of the fact
13 that counsel cannot represent a class of persons who received
14 calls, both on their residential line and their cell phone.
15 In addition to the fact that he, himself, did not receive a
16 call on his cell phone.

17 THE COURT: But couldn't you have subclasses? I
18 mean, in other words --

19 MR. ASNEN: I mean, that's not alleged.

20 THE COURT: Oh. But, I mean, I think some of these
21 issues are perhaps premature, because the certification
22 question really doesn't go to dismissal of the claims, or even
23 striking them. I think at this point the question becomes,
24 down the road, will that prevent certification or affect
25 certification. But the case law does seem pretty clear that,

1 right now, it wouldn't be appropriate for me to judge some of
2 these potential certification issues, even, quite frankly, the
3 fact that Mr. Bank may not be able to represent individuals
4 who were called on their cell phones, one could argue. It
5 seems to me the majority of the case law says that's a
6 question to reserve for certification, and unless there's
7 really some jurisdictional or fundamental defect in the claim
8 that's being raised for class certification, that I should not
9 entertain a motion to strike or to dismiss the class
10 allegations at this point. That's at least my reading of
11 these -- the majority of cases.

12 So that I'm not inclined to do. In other words, if
13 I find that Mr. Bank has stated a TCPA claim against either/or
14 both defendants, I'm likely to leave the class claims as is
15 for now, and then save them for a later day and later argument
16 on the certification question. And, obviously, Mr. Bank
17 realizes he can't represent the class as a lawyer, or serve as
18 class counsel. But that's an issue for another day as well.

19 So that's my inclination on that, unless you want to
20 say something further on that particular issue.

21 MR. ASNEN: Well, you touched upon jurisdictional
22 defect with regard to the class claims, and I'm curious
23 whether or not Your Honor viewed that as touching upon the
24 arguments on the personal jurisdiction of absent members.

25 THE COURT: Well, go ahead. You can talk about

1 that. That would potentially be an argument, the
2 Bristol-Myers argument, you mean?

3 MR. ASNEN: Correct.

4 THE COURT: Yeah, I mean, part of the problem I
5 think you have there is that that case, obviously, arose in
6 the context of a state prosecution. So a bunch of
7 non-California plaintiffs went to California and sued
8 Bristol-Myers, which isn't the California company, and there
9 the Supreme Court basically found that that couldn't be done,
10 because there was no personal jurisdiction of the state court.

11 I think there's a fundamental question about whether
12 Bristol-Myers would extend to a federal class action being
13 brought here, and, quite frankly, I don't know if I would
14 address the personal jurisdiction claim right now. But it
15 does seem to me you have a New York resident who is alleging
16 that he was contacted here in New York by defendants or one of
17 the defendants, and I don't think the same issues or the same
18 arguments can be applied. Plus, fundamentally, I'm not
19 confident that Bristol-Myers has, or I would say, that
20 Bristol-Myers should be applied in a federal case such as
21 this. And I don't think the case law right now is
22 particularly strong on that.

23 So to avoid, I think, a potential error, I would not
24 go that route in terms of the class allegations. Essentially,
25 I think, if I -- as I said before, for me, the inquiry is more

1 about whether or not Mr. Bank has adequately stated the actual
2 TCPA claims against both defendants. And that will determine
3 whether or not he gets to proceed as well, based on these
4 class allegations.

5 So when I said jurisdictional, I wasn't actually
6 referring to that, because I don't think the Bristol-Myers
7 argument is a particularly strong one, just given how
8 undeveloped the case law is right now.

9 MR. ASNEN: I don't know that this is necessarily
10 settled either, where district courts have uniformly found
11 that Bristol-Myers has no application to federal cases. I
12 think that within TCPA, I think there is a strong basis to say
13 it does apply because the TCPA doesn't authorize nationwide
14 service of process, so this court would have to apply state
15 substantive service of process, jurisdictional law, so I think
16 that there is a case to be made that where intuitively
17 nonresident class members would be bringing claims against
18 defendants who are not New York citizens, those claims
19 necessarily would have no nexus to New York.

20 THE COURT: I think, again, that may be an issue for
21 certification, but I don't think they're appropriate now in
22 terms of actually striking the class allegations. So that I
23 wouldn't do.

24 So here's what I am prepared to do, folks. I am
25 going to issue a decision in fairly short order. You probably

1 have some idea at least where I am going, or at least
2 Mr. Bank, you probably do on the state law claim, but I will
3 mull it over more in terms of your argument that you've
4 clarified or reiterated.

5 MR. BANK: Thank you.

6 THE COURT: And then we will go from there in terms
7 of discovery, if the case is going to go forward.

8 MR. ASNEN: Can I understand something?

9 THE COURT: Yes.

10 MR. ASNEN: On the state law claim, to the extent
11 you are inclined to revisit your own intuition. I would be
12 remiss if I didn't bring up the *Jenkins* case from this court
13 where that -- these issues have been briefed and decided
14 within this court, and that court ultimately determined that
15 omissions of information on these phone calls, while there may
16 be a violation, again, counsel would not be prejudiced to
17 bring these in state court, where they would obviously have
18 jurisdiction. That's not enough to necessarily rise to the
19 level of the concrete injury needed for standing, and I think
20 that it would also be worth noting that there was no risk of
21 injury here because Mr. Bank ultimately got these people's
22 numbers and spoke with them. So --

23 THE COURT: He got many numbers, apparently.

24 MR. ASNEN: He's operating in a hypothetical world
25 for the purposes of this claim.

1 THE COURT: Right.

2 MR. BANK: Can I briefly respond?

3 THE COURT: Yes. Go right ahead.

4 MR. BANK: Thank you.

5 First, a key distinction, which we talked -- I
6 talked about on pages 8 or really page 9 of the brief that
7 deals with the state law claim, is that in *Jenkins*, and the
8 court emphasized this, that none of the required information
9 was disclosed, but there was a phone number that was
10 disclosed. At least by disclosing a phone number, I don't
11 think a fake caller ID number like I had, but by disclosing a
12 phone number presumably, as was the case in *Jenkins*, the
13 recipient -- that enabled the recipient to contact the call or
14 the entity on whose behalf the call was made. And, again, I
15 can only emphasize, I guess one last time, it is the risk of
16 harm.

17 I acknowledge, I bring forth -- obviously, I
18 contacted the defendant, or defendants, they got multiple
19 numbers. Once I knew who one was, and one thing led to the
20 other, but it is the risk. They did create that risk, and
21 that's not in dispute, I don't think.

22 THE COURT: I just don't happen to agree with you
23 that your risk of harm theory is one that should be applied in
24 this context, recognizing the very limiting nature in which
25 that theory has been applied is an exception to the general

1 rule that a bare violation of a statute without any attendant
2 harm doesn't -- isn't enough, because it really -- the cases
3 that you mention are really quite different in kind in terms
4 of the actual risk, or -- and the harm that was at risk there.
5 So I just don't view this as comparable.

6 MR. BANK: I do think the principles are the same.
7 Yeah, the contexts were different, but I think the principle
8 in my case and in the *Adkins* and *Public Citizen*, in terms of
9 standing, I think the principles are the same in whatever
10 context there might be, at least the one here and the one in
11 the two Supreme Court cases that I mentioned.

12 THE COURT: Yeah, I just think there's a difference
13 in degree, maybe, and kind, but certainly in degree, and I am
14 not sure that I can adopt your theory.

15 So all right. So is there anything else either side
16 would like to say before I let you both go?

17 MR. ASNEN: I don't think so.

18 MR. BANK: No.

19 THE COURT: Thank you. Very much.

20 MR. BANK: Thank you, Your Honor. Thank you for
21 your time.

22 MR. ASNEN: Thank you.

23 (WHEREUPON, at 3:16 p.m., the proceedings were
24 concluded.)
25

Exhibit “B”

Invoice for the Transcript of Oral Argument

December 11, 2018

Invoice

INVOICE NO.	DATE SENT	DATE DUE	AMOUNT DUE
20190036	5/16/2019	5/24/2019	\$243.36

INVOICE FOR	SEND PAYMENT TO
Todd C. Bank 119-40 Union Turnpike Fourth Floor Kew Gardens, NY 11415 718-520-7125	Annette M. Montalvo PO Box 1647 New York, NY 10028

Tax ID: (EIN) 81-1329264
(W9 enclosed or on file)
Office: 718-804-2711
annette.montalvo@gmail.com

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
14 Day original	Oral Argument - 12-11-2018 18cv1311	52	4.68	243.36
14 Day original	PDF transcript emailed on 5-16-2019			0.00
	PREPAYMENT HAS BEEN WAIVED - PAYMENT IS DUE UPON RECEIPT OF TRANSCRIPT.			0.00
	THANK YOU!			
	Bank-v-CreditGuard of America, et al. 18cv1311			0.00
	United States District Court Eastern District of New York			
	Judge Pamela K. Chen			
Total				243.36
Balance Due				243.36

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of
All Others Similarly Situated,

1:18-cv-01311-PKC-RLM

Plaintiff,

-against-

CREDITGUARD OF AMERICA, INC., FREEDOM DEBT
RELIEF, LLC, FREEDOM FINANCIAL NETWORK, LLC,
and FREEDOM FINANCIAL NETWORK FUNDING, LLC,

Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR SANCTIONS AGAINST COUNSEL TO FORMER DEFENDANT
PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TODD C. BANK, Individually and on Behalf of
All Others Similarly Situated,

1:18-cv-01311-PKC-RLM

Plaintiff,

-against-

CREDITGUARD OF AMERICA, INC., FREEDOM DEBT
RELIEF, LLC, FREEDOM FINANCIAL NETWORK, LLC,
and FREEDOM FINANCIAL NETWORK FUNDING, LLC,

Defendants.

INTRODUCTION

Plaintiff, Todd C. Bank (“Bank”), submits this memorandum of law in support of Bank’s motion, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for sanctions against Neil E. Asnen and Klein Moynihan Turco LLP (“KMT”), counsel to former Defendant, CreditGuard of America, Inc. (“CGA”).

PROCEDURAL BACKGROUND

As recounted in the affidavit of Neil E. Asnen, dated May 6, 2019 (Dkt. No. 54-1), all of the facts upon which CGA’s motion for sanctions is based occurred before June 26, 2018, which is the date on which CGA, as required by Rule 11(c)(2), served, upon Bank, a motion seeking sanctions based upon Bank’s assertion of a claim against CGA under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).

On April 19, 2018, Mr. Asnen, on behalf of Defendants (that is, CGA and what are now the three remaining defendants), filed a pre-motion-conference letter (Dkt. No. 15) regarding Defendants’ anticipated motion to dismiss the Complaint (Dkt. No. 1). Mr. Asnen’s letter contained a section titled “The TCPA Exempts from Liability Tax-Exempt Non-Profit Entities Such as CGA.” No mention of sanctions was made in that letter; nor did that letter contend that CGA’s non-profit status rendered

Bank's TCPA claim against CGA frivolous.

On June 7, 2018, Defendants served a motion to dismiss the Complaint (Dkt. No. 1); like the pre-motion-conference letter, the motion, which sought, *inter alia*, dismissal of Bank's TCPA claim against CGA based upon CGA's non-profit status, did not contend that that status rendered Bank's TCPA claim against CGA frivolous nor sanctionable.

On June 11, 2018, Bank filed an Amended Complaint (Dkt. No. 20).

On June 22, 2018, Defendants filed a pre-motion-conference letter (Dkt. No. 21) regarding Defendants' anticipated motion to dismiss the Amended Complaint. Like the previous letter, this one also contained a section with the above-quoted title but did not contend Bank's TCPA claim against CGA was frivolous nor sanctionable.

On July 20, 2018, Defendants served a motion to dismiss the Amended Complaint (later filed as Dkt. Nos. 25-27), wherein Defendants, yet again did not contend Bank's TCPA claim against CGA was frivolous nor sanctionable; indeed, neither of Defendants' motions nor pre-motion-conference letters referred to the motion for sanctions that Defendants had served. The same is true of Defendants' reply memorandum of law (Dkt. No. 33) in further support of the dismissal motion.

On December 11, 2018, the Court held oral argument on Defendants' motion to dismiss the Amended Complaint.

On March 22, 2019, the Court issued a Memorandum & Order (Dkt. No. 38) that, *inter alia*, dismissed Bank's TCPA claim against CGA.

On May 20, 2019, Bank, by ECF (Dkt. No. 51) and email, served, upon CGA's counsel: (i) Bank's opposition to CGA's motion for sanctions; and (ii) Bank's motion for sanctions against CGA's counsel pursuant to Rule 11. Service of Bank's motion constituted service in accordance with the 21-day 'safe harbor' of Rule 11(c)(2). *See* Bank's memorandum of law (Dkt. No. 51), *Nota Bene*, pp.1-2; letter from Bank to the Court (Dkt. No. 55), pp.1-2.

ARGUMENT

POINT I

**DEFENSE COUNSEL, FAR FROM BEING ENTITLED TO HAVE
SANCTIONS AWARDED IN FAVOR OF ITS CLIENT, SHOULD
BE SANCTIONED FOR MAKING A FRIVOLOUS MOTION**

A. This Court Clearly Did Not Believe that the Claim at Issue was Frivolous

This Court, in the March 22, 2019, Memorandum & Order (the “Order”; Dkt. No. 38), did not even suggest that Bank’s TCPA claim against CGA was frivolous; nor did Mr. Asnen make any such assertion during the oral argument. Indeed, during the oral argument, this Court, far from finding that Bank’s TCPA claim against CGA was frivolous, unmistakably indicated that it found the claim to be *meritorious*:

[U]nder the dual[-]purpose standard, I think they -- CGA, at least at this stage, *can’t really rest on this immunity under -- or exception under the TCPA*. Again, at the pleading stage, there seems to be a very close relationship established in not one, not two, but it seems like three different calls with representatives of both defendants’ companies.

So, again, *I just don’t see how you avoid both the agency inference as well as the dual[-]purpose inference*, when, in fact, they are both saying, when it doesn’t work for Financial Federal (sic.), they send the caller to CGA. At that point, certainly CGA seems to be acknowledging that Federal Financial is making these dual[-]purpose calls on its behalf. Either it is going to be a commercial call that Federal Financial will handle, or it is going to be a referral to CGA, for those who don’t qualify.

Once they sort of align themselves or link themselves to Federal Financial, *I don’t think, at this stage at least, they can hide behind this exemption for nonprofits*.

Transcript of Oral Argument, Dec. 11, 2018, at 13:24 - 14:17 (emphases added, as are all emphases when herein quoting the transcript) (a copy of the transcript is annexed as Exhibit “A” to the Declaration of Todd C. Bank). *See also id.* at 16:23 - 17:6 (“if that initial call had a partially commercial component, which it did, because, again, there was a decision tree, if ‘X’ you go to

Federal Financial, if ‘Y,’ you go to CGA, then it seems to me *CGA shouldn’t be able to avail itself of the exemption under the TCPA*. Because, in effect, they are *hiding* behind this Federal Financial company in some way to have them be the *stalking horse*, if you will, but, clearly, the initial contact, there’s no question, was commercial in nature”); *id.* at 17:6-10 (“isn’t it true that if there was a marketing component to this initial call to Mr. Bank, that that would meet the *dual[-]purpose definition*, at a minimum, assuming that there’s then also an informational component?”); *id.* at 19:1-2 (“what we’re quibbling about, though, is what does it mean to be exempt”); *id.* at 31:7-12 (“what you [(i.e., Mr. Asnen)] are arguing for is a matter of policy, really, seems wrong, which is that so long as a company sets itself up as a nonprofit, they can do whatever they want. They could solicit business for -- or they can violate the automated call rule, that’s what you would say, right?”); *id.* at 31:18 - (“[i]f the allegations are accepted as true, they suggest that -- or they reasonably suggest that CGA is basically working with Freedom Financial to make these calls to market services of either Freedom Financial or CGA, whatever the circumstances are, and that they are then *skirting, because they have this exempt status, the regulation that would prevent them from making automated calls*, and they shouldn’t be held liable, but Freedom Financial should be, is essentially what you are arguing.”); *id.* at 32:16 - 33:1 (“I guess the problem I am having is, A, *the FCC did say that there was this doctrine of dual purpose*. The fact that it hasn’t been applied in any case, I don’t know how compelling that is. Obviously, all the cases are very fact specific. But if I find that there’s a reasonable inference that CGA either gave authority to or ratified the actions of Freedom Financial to make this marketing call on its behalf, as well as on behalf of Freedom Financial, so, therefore, a *dual[-]purpose call*, that CGA should still not be -- should still [sic] be exempted from the TCPA because of its status.”).

Although the Court, in the Order, took a different view of the matter than had the Court during the oral argument, that changing of its view hardly meant, as would be necessary to support sanctions, that the Court’s expressions during the oral argument were so fundamentally flawed as to

themselves have been the equivalent of frivolous (which, obviously, they were not).

CGA, in making much of the provision, by its counsel, to Bank, of evidence of GGA's non-profit status, misses the point entirely: the dispute before the Court was not over whether CGA was non-profit but whether that status rendered CGA exempt from Bank's TCPA claim. Thus, the number of times that CGA's counsel repeated, to Bank, that CGA was non-profit is irrelevant. Moreover, CGA's assertion that "CGA repeatedly advised Plaintiff that it cannot be held liable for the subject call at issue even when taking the FAC's allegations as true," CGA Mem. at 6, does not mean that CGA's counsel was right, much less that Bank's claim was frivolous. Although Bank responded each time with his own legal analysis (which, of course, was repeated in Bank's opposition to Defendants' dismissal motion), that, too, is immaterial; indeed, CGA's argument regarding frivolousness is equivalent to Bank's having argued, had the Court *upheld* Bank's claim, that CGA's counsel's position was frivolous on account of Bank's having repeatedly expressed his view to CGA's counsel.

Finally, CGA states: "[g]iven that in this case, [Bank] keeps his own counsel, Plaintiff's harassment of CGA with a patently frivolous suit is all the more egregious." CGA Mem. at 6. This simply makes no sense: whether Bank was (as is this case) representing himself, or had been representing a client, his obligation not to advance a frivolous claim would have remained the same. To be sure, Bank's claim was not frivolous in any event.

B. CGA's Request for Injunctive Relief is Frivolous

CGA states: "[CGA's] request for monetary sanctions should be granted *in conjunction with* the imposition of injunctive sanctions against Plaintiff, enjoining future filings as appropriate. Despite being *pro se*, Plaintiff is a seasoned litigator who has attempted to litigate the same claims in this district over and over again," CGA Mem. at 8 (emphasis by CGA), for which CGA cites two Second Circuit opinions: *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984), and *In re Hartford Textile Corp.*, 681 F.2d 895 (2d Cir. 1982) (*per curiam*). A simple recitation of the facts in those cases

shows that, even aside from the fact that Bank's claim against CGA was not frivolous, CGA's invocation of those cases is plainly frivolous. In *In re Martin-Trigona*, the court recounted the facts as follows:

To those who follow the business of the courts, the appellant needs no introduction. He is the source of literally hundreds of lawsuits, motions and miscellaneous pleadings, *all but a small fraction of which lack any merit whatsoever*. Viewing [the appellant]'s litigious conduct in its entirety yields the inescapable conclusion that he *persistently resorts to legal processes without regard to the merits of the claims asserted* and that he invokes those processes largely to harass persons who have unluckily crossed his path. His abuse of legal processes is exemplified not only by the number and variety of *meritless* actions but also by his recent use of pleadings and other legal papers, the contents of which are set out in their appalling detail in the district court's opinion, as a vehicle to launch vicious attacks upon persons of Jewish heritage.

In re Martin-Trigona, 737 F.2d at 1256 (emphases added). In *In re Hartford Textile*, the court recounted the facts as follows:

This case, which has *an almost unparalleled history of frivolous and repetitious claims, motions, petitions, demands, and appeals*, arose out of the bankruptcy court's denial of [the] appellant's claim for \$80,000 sales commissions allegedly owed to [the] appellant's deceased husband. Before this Court heard argument on the merits for the first time, [the] appellant already had made at least twenty-five motions, *most of which were meritless and repetitious*. Among them were motions to disqualify the bankruptcy judge and [the defendant]'s attorneys and for the appointment of a special prosecutor. *We stated then that we did not condone the course of conduct that appellant's counsel had pursued*.

In re Hartford Textile, 681 F.2d at 897 (emphases added; citations omitted).

CGA notes that, "[t]he Second Circuit has identified [certain] factors as being relevant in resolving an application for anti-litigation-related injunctive relief," CGA Mem. at 9, and that, "[a]n analysis of [those] factors and considerations weighs heavily in favor of issuing the requested anti-filing injunction." *Id.* Regarding the first of these factors, *i.e.*, "the litigant's history of litigation and in particular *whether it entailed vexatious, harassing or duplicative lawsuits*," *id.* (emphasis

added), CGA states: “[o]n the first factor, Plaintiff’s history of filing TCPA claims in this district alone is prolific.” *Id.* That is (relatively) true, but CGA does not even purport to claim that any of this litigation history, let alone a substantial amount of it, “entailed vexatious, harassing or duplicative lawsuits.” To be sure, CGA elsewhere refers to “[Bank’s] long history of meritless claims,” CGA Mem. at 11, but, again, provides no details, much less the type of history that could warrant the injunction that CGA seeks.

In *Cunningham v. Rapid Response Monitoring Svcs., Inc.*, No. 15-cv-00846, 2017 WL 1489052 (M.D. Tenn. Apr. 26, 2017), the court rejected the notion, advanced here by CGA, that a person is somehow obligated not to be a “prolific” filer of TCPA cases:

[The] plaintiff’s *numerous lawsuits* show that he is *acutely aware of his rights under the TCPA* and the *potential that he could reap monetary rewards* from them. . . . [I]t is safe to say that, when the telemarketers in this case called a phone belonging to [the] plaintiff, they—presumably unwittingly—found themselves in the sights *not of an ordinary hapless consumer*, but a *seasoned plaintiff*, likely *primed and ready to take them to court* if their actions violated the TCPA.

Id. at *4 (emphases added). However, “[n]othing in the Constitution, though, requires a plaintiff to be a naïf. Litigation is not college athletics: there is no ‘amateurs only’ rule.” *Id.*, citing *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006).

Cunningham further explained:

The statutory damages available under the TCPA are, in fact, *specifically designed to appeal to plaintiffs’ self-interest* and to *direct that self-interest toward the public good*: “like statutory compensation for *whistleblowers*,” they “operate as *bounties*, increasing the *incentives for private enforcement of law*.” *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014). Designing a cause of action with the purpose of enlisting the public in a law’s enforcement scheme is a *well-established tool* that can be found in areas ranging from antitrust and civil[-]rights law to environmental law and false claims.

Id. (emphases added).

In *Cunningham* as in the present case, “[the] [d]efendants suggest[ed] that, by becoming a so-called ‘professional plaintiff,’ [the plaintiff] has forfeited [his] rights because the calls alleged were not truly unwanted.” *Id.* at *5. The court rejected this suggestion, comparing a typical ‘serial’ plaintiff with one who went *out of his way* to generate TCPA claims (which CGA does not even suggest is the case here) and was found, as a result, to lack an injury as required of Article III standing (a result with which, incidentally, *Cunningham* disagreed). *See id.* (concluding the discussion noting that, “[t]he [d]efendants seem to imagine a Constitution that limits the right to sue under the TCPA to those who are ignorant of their right to sue under the TCPA.”).

According to CGA, a person who receives, for example, 50 unlawful robocalls better let slide a certain number of them (but who knows how many before it shall become ‘open season’ for telemarketers to violate the person’s rights with impunity?). CGA’s “professional plaintiff” argument is, again, transparently specious. *See also Murray v. GMAC Mortgage Corp.*, *supra*, in which the court observed: “[t]he district judge regarded [the plaintiff and her family members] [as] . . . professional plaintiffs. . . . What the district judge did not explain, though, is *why* ‘professional’ is a dirty word. . . . The district judge did not cite a *single decision* supporting the proposition that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders.” *Murray*, 434 F.3d at 954 (emphases added). The “professional plaintiff” nonsense that CGA self-servingly advocates was again rejected in *Bais Yaakov of Spring Valley v. Educational Testing Service*, 367 F. Supp. 3d 93, 114-116 (S.D.N.Y. 2019); *see also Robert W. Mauthe, M.D., P.C. v. MCMC LLC*, No. 18-cv-1901, 2019 WL 2088054 (E.D. Pa. May 13, 2019) (same); *Mey v. Venture Data, LLC*, 245 F. Supp. 3d 771, 783 (N.D. W.Va. 2017) (“[t]t is true that the plaintiff has brought a number of TCPA cases. It is further true that she has telephone answering and recording equipment which is more sophisticated than that of the average consumer. It is not true that she seeks to receive such calls. She does nothing to attract the calls; in fact, her telephone number is listed on

the National Do Not Call Registry. Rather, she uses her equipment to record and document TCPA calls when they do occur. This does not deprive the plaintiff of standing any more than the purchase of a burglar alarm would indicate that the homeowner wanted her house to be broken into” (although Bank’s telephone number is listed on the National Do Not Call Registry, the call at issue in this case was unlawful without regard to that fact; and, of course, the mere lack of such a listing would not constitute an invitation for such calls any more than a person *without* a home-alarm system could thereby be deemed to be inviting burglars into his home)).

CGA makes the nonsensical argument that Bank’s recent motion practice, which concerned Bank’s state-law claim, somehow warrants sanctions with respect to the claim that *is* at issue, *i.e.*, Bank’s TCPA claim against CGA. *See* CGA Mem. at 10. As if this were not bad enough, CGA, while complaining, with respect to the latter claim, that “CGA has incurred significant costs in the form of attorneys’ fees,” *id.* at 7, does not note that, with respect to the recent motion practice, CGA opposed only Bank’s motion for reconsideration but not any of the subsequent motions (nor does CGA note this when it reiterates his complaint regarding legal fees, *see* CGA Mem. at 11). Moreover, given the very nature of a motion for reconsideration of a dismissed claim, Bank obviously could not have withdrawn that claim in response to CGA’s motion for sanctions; indeed, CGA filed its motion for sanctions after the recent motion practice ended.

Finally, CGA states: “[Bank’s] abuse of the judicial system mirrors nearly identically the pattern of behavior as exhibited by Plaintiff in another action pending in the Eastern District, *Bank v. Fluent, Inc. et al*, 1:18-cv-3307. There, over the course of two days, Plaintiff filed seven (7) motions strike defendants’ answer, each in violation Judge Kuntz’s Individual Rules and denied accordingly.” CGA Mem. at 10 (footnote omitted). Mr. Asnen, who represents the defendants in that case, omits the facts that no finding of frivolousness was made, that sanctions were neither requested nor imposed, and that the matter is currently the subject of a mandamus petition in the Second Circuit

(No. 19-219op). Indeed, CGA does not even inform this Court that, in *Fluent*, Bank is challenging, *inter alia*, the district court's individual-practice rule concerning pre-motion conferences with respect to a motion (*i.e.*, a motion under Rule 12(f)(2)) that has a time limit for being filed; much less does CGA explain why that challenge is frivolous.

CONCLUSION

Bank requests the following: (i) that the Court grant, to Bank, in either the form of costs of sanctions, Bank's reasonable expenses, including, but not limited to, \$243.36 for the cost of the transcript of the oral argument before this Court on December 11, 2018; and (ii) that the Court grant, to Bank, any additional just and proper relief.

Dated: June 12, 2019

s/ Todd C. Bank

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, a true and accurate copy of the foregoing document is being filed electronically via the Court's electronic-filing (ECF) system. Notice of this filing will be sent to all parties by operation of the Court's ECF system and copies will be mailed to those parties, if any, who are not served via the Court's ECF system.

Dated: June 12, 2019

s/ Todd C. Bank

TODD C. BANK